IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CENTRAL EXCISE APPEAL NO. 88 OF 2005

Commissioner of Central Excise, Mumbai - III .. Appellant

V/s

M/s. In Coach Builders .. Respondents

Mr. R.V. Desai, Sr. Advocate with Mrs. Neeta Masurkar for the Appellant

Mr. Prakash Shah i/b. PDS Legal for the Respondents

CORAM : DR.S.RADHAKRISHNAN & J.P.DEVADHAR, JJ.

DATE : 10TH JANUARY, 2006.

P.C.:

1. Heard learned Counsel for the Appellant and the learned counsel for the Respondents. In the above appeal, following question of law is sought to be raised :-

a) Whether in the facts and circumstances of the case the Tribunal was right in holding that since the demand of duty has been dropped, penalty cannot be imposed even if the demand was dropped on the technical ground of time bar.

2. We have also perused the order in original,

wherein in paragraph - 31 the Commissioner of Central Excise has observed that, as the demand itself was not sustainable as the same was time barred for recovery, there was no question of imposition of any penalty on the Assessee. In the order passed by the CESTAT dated 29th October, 2004 the Tribunal has relied upon the order passed by the larger Bench in the case of **Godrej Soaps Vs. CCE** and has held that the penalty cannot be imposed when there is no demand of duty.

3. The learned Counsel for the Petitioner has brought to our notice the judgment of the Hon'ble Supreme Court in the case of **CCE Vs. H.M.M. Ltd. 1995 (76) E.L.T. 497 (S.C.)** wherein the Supreme Court has clarified that the question of penalty would arise when the department is able to sustain its demand under notice. The same view has been taken subseuqently by the Supreme Court in the case of **P & B Pharmaceuticals (P) Ltd. Vs. CCE 2003 (153) E.L.T. 14 (S.C.)** and has clearly held that even the very levy cannot be sustainable. Under these circumstances, there is no substantial question of law. Appeal stands dismissed.

(DR.S.RADHAKRISHNAN, J.)

(J.P.DEVADHAR, J.)